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No. 93-1446

In the Supreme Court of the United States

OCTOBER TERM, 1993

RENATE CRETAN, ETC., ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND BETHLEHEM STEEL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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18 pp

QUESTION PRESENTED

The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, establishes a federal compensation scheme for injuries causing disability or death arising out of maritime employment. Under 33 U.S.C. 933(g), a "person entitled to compensation" under the LHWCA must obtain the employer's written approval prior to entering into a settlement with a liable third person, if the amount of the settlement is less than the compensation to which the person is entitled under the LHWCA. If the person does not obtain such prior written approval from the employer, the person forfeits all rights to LHWCA compensation and medical benefits.

The question presented is whether the term "person entitled to compensation" in 33 U.S.C. 933(g) includes an injured worker's relative who settles a potential wrongful death action against a third party at a time when the injured worker is alive, and therefore at a time when the relative is not eligible for death benefits under the LHWCA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1:7929-7939) is reported at 1 F.3d 843. The decision and order of the Benefits Review Board (Pet. App. 4:1-16) are reported at 24 Ben. Rev. Bd. Serv. (MB) 35. The decisions and orders of the administrative law judge (Pet. App. 6:1-8, 7:1-2, 9:1-2, 10:1-23) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 28, 1993. Petitions for rehearing were denied on November 19 and 29, 1993. Pet. App. 3:1-2; App., *infra*, 1a, 2a. The

petition for a writ of certiorari was filed on February 17, 1994. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) requires employers to pay compensation to covered workers and their survivors for work-related injuries that result in disability or death, 33 U.S.C. 908, 909, and to provide medical services for covered injuries, 33 U.S.C. 907. A "person entitled to * * * compensation" under the LHWCA, however, may also recover from a third person who is liable in damages. 33 U.S.C. 933(a). If the person obtains such a recovery, the employer receives a credit against its LHWCA compensation payments to the extent of the employee's "net" recovery from the third party. See 33 U.S.C. 933(f).

If the "person entitled to compensation" wants to settle the action with the liable third person, and if the settlement is to be for less than the amount of compensation to which the person would be entitled under the LHWCA, the person must obtain the employer's prior written approval of the settlement. 33 U.S.C. 933(g)(1). If the person does not obtain such prior approval, the person forfeits all LHWCA rights to compensation and medical benefits. 33 U.S.C. 933(g)(2).[1]

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[1] 33 U.S.C. 933(g) provides in relevant part:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person * * * for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation * * * only if written approval of the

A disability award that is unpaid at the time of a worker's death is payable to the worker's eligible survivors. See 33 U.S.C. 908(d). If the work-related injury caused the worker's death, a surviving widow or widower and children are entitled to death benefits. See 33 U.S.C. 909.[2]

2. Petitioners Renate Cretan and Nicole Cretan are the wife and daughter of John Cretan. John Cretan was exposed to asbestos in 1942 and 1943, while working as a shipyard electrician for respondent Bethlehem Steel Corporation. Pet. App. 4:2, 10:2-3. In January 1984, he was diagnosed with mesothelioma and stopped his current employment as a teacher. *Id.* at 4:2, 10:3. In April 1984, he filed a claim under the LHWCA, seeking disability benefits from Bethlehem Steel. Bethlehem Steel disputed the claim.

John Cretan also filed a lawsuit against third persons (various asbestos manufacturers) seeking damages for his injuries that arose out of his exposure to asbestos. He entered into a settlement with the third persons. Pet. App. 1:7932, 4:2, 10:10. Petitioners were not parties to John Cretan's lawsuit. Nonetheless, as a condition of John Cretan's settlement with the third parties,

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settlement is obtained from the employer and the employer's carrier, before the settlement is executed * * *.

(2) If no written approval of the settlement is obtained and filed * * * all rights to compensation and medical benefits under this chapter shall be terminated * * *.

[2] A "child" must generally be under the age of 18 (unless incapable of self-support and dependent on the decedent) or be a student as defined in the statute. 33 U.S.C. 902(14). A "widow" must generally be the decedent's spouse and live with or be dependent on the decedent at the time of death, unless living apart for justifiable cause or desertion. 33 U.S.C. 902(16).

petitioners were required to release their potential wrongful death claims against the settling parties. *Id.* at 1:7932, 10:10-11. Renate Cretan also settled a separate action she had brought for loss of consortium. See *id.* at 10:10.

John Cretan died in February 1985. At the time of his death, his LHWCA disability benefits claim against Bethlehem Steel had not been adjudicated. Pet. App. 4:2, 10:3; Pet. 1. Petitioners, as John Cretan's successors, pursued that disability benefits claim. Pet. App. 1:7932, 4:3. Petitioners also filed their own LHWCA claim for death benefits, alleging that John Cretan's death resulted from his employment with Bethlehem Steel. *Id.* at 1:7930, 4:3.

3. The Administrative Law Judge (ALJ) awarded benefits for death and disability. Pet. App. 10:1-23. He found that John Cretan's exposure to asbestos while working for Bethlehem Steel had caused his mesothelioma, which in turn had permanently and totally disabled him in January 1984 and caused his death in February 1985. *Id.* at 10:4-5.

The ALJ rejected Bethlehem Steel's argument that petitioners should be barred from recovery under 33 U.S.C. 933(g) because they had not obtained Bethlehem Steel's approval prior to their settlement with the third parties. The ALJ concluded that the Cretans did not forfeit their LHWCA benefits when they failed to obtain Bethlehem Steel's prior written approval of the settlement because Section 933(g) applies only to a "person entitled to compensation." The ALJ interpreted that provision to include only "persons [who are] actually receiving, or already adjudicated to be entitled to receive, compensation." Pet. App. 10:17. Because none of the Cretans was receiving compensation when they

settled their third-party claims, the ALJ found that Section inapplicable. *Ibid.*

The ALJ did conclude, however, that Bethlehem Steel was entitled to an offset under 33 U.S.C. 933(f) for the settlement received by petitioners. Pet. App. 6:2, 8:1, 10:19-22. Bethlehem Steel received a complete offset on the disability claim because John Cretan's third-party recovery was larger than his LHWCA entitlement, but it received only a partial offset against petitioners' death benefit claims. See *id.* at 5:2, 8:2, 10:22.

4. The Benefits Review Board affirmed, except with respect to certain calculations concerning the amount of Bethlehem Steel's offset on petitioners' death benefit claims. Pet. App. 4:1-16. The Board agreed with the ALJ that the term "person entitled to compensation" in 33 U.S.C. 933(g) means a person who was receiving compensation at the time of the settlement. Pet. App. 4:5. The Board also agreed with the ALJ that Bethlehem Steel was entitled to some offset in this case under 33 U.S.C. 933(f). Pet. App. 4:7-8 & n.3.

5. The court of appeals affirmed in part and reversed in part, with the result that petitioners were precluded from receiving any recovery under the LHWCA. The court affirmed the Board's decision insofar as it allowed Bethlehem Steel to offset petitioners' third-party recovery against its LHWCA liabilities under 33 U.S.C. 933(f). Pet. App. 1:7938. The court relied on its earlier ruling in *Force* v. *Director, OWCP*, 938 F.2d 981, 984-985 (9th Cir. 1991), that for purposes of the offset provision in 33 U.S.C. 933(f), "a claimant's status as a 'person entitled to compensation' need not be fixed at any particular moment." Pet. App. 1:7935. The court rejected petitioner's argument that *Force* was implicitly

overruled by this Court's decision in *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992).[3]

The court of appeals recognized that some language in *Cowart* "appears to support" petitioners' position, because the Court stated that for purposes of the forfeiture provision in 33 U.S.C. 933(g), a person is "entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability." Pet. App. 1:7936 (quoting *Cowart*, 112 S. Ct. at 2595). The court of appeals also noted that this Court explained that "the normal meaning of entitlement is that 'the person satisfies the prerequisites attached to the right.'" Pet. App. 1:7936 (quoting *Cowart*, 112 S. Ct. at 2595.) The court of appeals treated the *Cowart* language as dicta, however, and rejected the interpretation based on that language as "separated from the facts to which it is addressed." Pet. App. 1:7936-7937.

Based on its determination that the term "person entitled to compensation" should receive the same construction in 33 U.S.C. 933(g) as it does in Section 933(f), and should further the goal of protecting the employer against inadequate settlements, the court reasoned that it must reverse the Board's decision insofar as the Board held that petitioners were not subject to 33 U.S.C. 933(g)'s forfeiture provision. Pet. App. 1:7937-7939. The court rejected petitioners' interpretation that they were not "person[s] entitled to compensation" at the time of the settlement because their entitlement to death benefits had not yet vested.

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[3] The court of appeals also acknowledged that it was rejecting the Director's interpretation of 33 U.S.C. 933(f), but it concluded that the Director's interpretation was unreasonable. Pet. App. 1:7937. The court correctly noted that the Director's position had changed since *Force*.

The court accordingly concluded that petitioners had forfeited their rights to LHWCA death benefits when they settled their potential wrongful death claims for less than their LHWCA entitlement. *Ibid.*

In light of the court's rulings, 33 U.S.C. 933(f) and (g) operated as a complete bar to petitioners' recovery from Bethlehem Steel. The court denied rehearing petitions filed by the claimant and the Director. App., *infra*, 1a, 2a.

ARGUMENT

Petitioners seek review of the court of appeals' interpretation of the term "person entitled to compensation" in 33 U.S.C. 933(g). We agree that the court of appeals erred by holding that persons such as petitioners are bound by the forfeiture requirement of 33 U.S.C. 933(g), with respect to settlement of future wrongful death actions against third persons based on the death of a worker that had not occurred as of the time of the settlement. Despite the error below, we do not believe that review by this Court is warranted at this time. While we agree that the court of appeals read *Cowart* too broadly and ignored relevant aspects of its analysis, the decision below appears to be the first appellate consideration of the issue following *Cowart*. It therefore does not present a circuit conflict warranting review by this Court. Rather, we believe that review by this Court would benefit from further development of the issue in the lower courts.

1. As this Court recognized in *Cowart*, 112 S. Ct. at 2595, "the normal meaning of entitlement includes a right or benefit for which a person qualifies." Petitioners did not qualify for LHWCA death benefits when they settled their potential wrongful death claims against third parties, because their eligibility was

contingent on a number of factors that had not yet occurred and were not certain to occur. Specifically, petitioners would be entitled to death benefits only if John Cretan, who was then alive, subsequently died from a work-related illness or injury, 33 U.S.C. 909, and only if petitioners had survived him and qualified as an eligible "widow" and "child." Under the "normal meaning" of "entitled," *Cowart*, 112 S. Ct. at 2595, therefore, petitioners were not, at the time of settlement, "person[s] entitled to compensation" who were required by 33 U.S.C. 933(g) to obtain the prior approval of the employer of third-party settlements. See also *Cowart*, 112 S. Ct. at 2595 (claimant in that case "became a person entitled to compensation at the moment his right to recovery vested").

It is appropriate to apply this "normal meaning" of "entitled" in 33 U.S.C. 933(g) in order to avoid "harsh and incongruous results" under the LHWCA. See *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); *I.T.O. Corp.* v. *Sellman*, 954 F.2d 239, 242-243, modified, 967 F.2d 971 (4th Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993). Although it may be necessary to construe Section 933(g) in a manner that creates "a trap for the unwary" when the language of the statute demands it, *Cowart*, 112 S. Ct. at 2598, that result is unnecessary in this case because the language of the statute is readily susceptible to the Director's interpretation.

The court of appeals incorrectly chose to depart from the normal meaning of "entitled" in order to further the purpose of protecting an employer from a situation in which a claimant settles a third-party action for too little. Pet. App. 1:7937-7938. The court thereby ignored not only the language of the statute but other purposes of 33 U.S.C. 933, which include protecting claimants' rights to sue third parties without forfeiting their right

to LHWCA compensation (see 33 U.S.C. 933(a) and (b)) and ensuring that claimants obtain a recovery from the third party and employer that is at least equal to what the LHWCA provides in compensation (see 33 U.S.C. 933(f); *Chapman* v. *Hoage*, 296 U.S. 526, 528 (1936)). Especially when all of these statutory purposes are considered, there is no need to depart from the normal meaning of "entitled" in 33 U.S.C. 933(g).

2. Despite the court of appeals' error, any inconsistencies between its decision and this Court's decision in *Cowart* do not merit review at this time. The court below is apparently the only court of appeals to have addressed the issue presented by this case since the Court's recent interpretation of 33 U.S.C. 933(g) in *Cowart*. Moreover, the precise issue addressed by the court of appeals was not before this Court in *Cowart*.

The question presented in *Cowart* was whether a "person entitled to compensation" within the meaning of 33 U.S.C. 933(g) was limited to LHWCA claimants who were "either already receiving compensation payments from their employer, or in whose favor an award of compensation has been entered." 112 S. Ct. at 2594. The Court held that the term "person entitled to compensation" does not exclude persons who were entitled to compensation at the time of the settlement even if the employer was not yet paying compensation and had not acknowledged that it was due. In reaching that conclusion, the Court noted that the "normal meaning" of entitlement "includes a right or benefit for which a person qualifies," and the Court stated that the claimant in *Cowart* "became a person entitled to compensation at the moment his right to recovery vested." 112 S. Ct. at 2595. Because the claimant in *Cowart* had filed for *disability* benefits, his right to recovery under the LHWCA vested at the time he

became disabled. The Court did not address the question presented in this case, which is when a claimant seeking LHWCA *death* benefits becomes a "person entitled to compensation." Thus, the issue addressed by the court of appeals in this case is not directly controlled by *Cowart*. Review by this Court therefore should await further development of the issue in the lower courts.

3. Petitioners' case is complicated by the question whether the court of appeals' construction of 33 U.S.C. 933(g) is necessary to preserve an employer's offset rights under 33 U.S.C. 933(f). See Pet. App. 1:7938. Petitioners and the Director argued to the court of appeals that under a "vested rights" definition of entitlement, not only would petitioners not forfeit their right to LHWCA benefits under Section 933(g), but also Bethlehem Steel could not offset petitioners' third-party recoveries against its LHWCA liability under Section 933(f). See Pet. App. 1:7937. The court of appeals rejected the position of petitioners and the Director under Section 933(g) in part because the court concluded that it necessarily led to an unreasonable result under Section 933(f). See Pet. App. 1:7937-7938. Petitioners are now asking this Court to review the court of appeals' decision because the court ignored an "equitable middle-ground" that would preserve an employer's offset rights under Section 933(f). See Pet. 9. Because petitioners did not present that argument to the court of appeals until after the court rendered its decision, the court below did not specifically pass on the "equitable middle ground," and it is not properly presented for this Court's review. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1994

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 90-70589/90-70634
OWCP No. 13-75715
BRB No. 87-909, 87-909A

RENATE CRETAN, WIDOW OF JOHN CRETAN; NICOLE CRETAN, DAUGHTER OF JOHN CRETAN,
PETITIONERS/CROSS-RESPONDENTS

v.

BETHLEHEM STEEL CORPORATION,
RESPONDENT/CROSS-PETITIONER

AND

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, RESPONDENT

[Filed Nov. 19, 1993]

ORDER

BEFORE: BROWNING, CHOY and CANBY, CIRCUIT JUDGES

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 90-70589/90-70634
OWCP No. 13-75715
BRB No. 87-909, 87-909A

RENATE CRETAN, WIDOW OF JOHN CRETAN; NICOLE CRETAN, DAUGHTER OF JOHN CRETAN,
PETITIONERS/CROSS-RESPONDENTS

v.

BETHLEHEM STEEL CORPORATION,
RESPONDENT/CROSS-PETITIONER

AND

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, RESPONDENT

[Filed Nov. 29, 1993]

ORDER

BEFORE: BROWNING, CHOY and CANBY, CIRCUIT JUDGES

The panel has voted unanimously to deny the petition of respondent Director OWCP for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

The respondent OWCP's motion for amendment of opinion is denied.